04-99001

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN COOPER, *Plaintiff & Appellant,* *v.* **RICHARD A RIMMER,** ***Acting Director of the California Department of Corrections;*** **JEANNE WOODFORD,** ***Warden, San Quentin State Prison, California,*** *Defendants & Appellees.*	**CAPITAL CASE** **EXECUTION DATE OF FEBRUARY 10, 2004**

On Review from the United States District Court
for the Central District of California
No. C 04-436 JF
The Honorable JEREMY FOGEL, U.S. District Judge

OPPOSITION TO EMERGENCY MOTION FOR STAY OF EXECUTION FOLLOWING DENIAL OF TEMPORARY RESTRAINING ORDER BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
STANDARD OF REVIEW	4
PROCEDURAL & FACTUAL BACKGROUND	5
ARGUMENT	14
THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING COOPER'S MOTION FOR A TEMPORARY RESTRAINING ORDER; COOPER HAS FAILED TO ESTABLISH GOOD CAUSE FOR BRINGING HIS ELEVENTH-HOUR CHALLENGE; COOPER HAS ALSO FAILED TO MEET HIS BURDEN OF DEMONSTRATING EITHER LIKELIHOOD OF SUCCESS ON THE MERITS OR THE EXISTENCE OF SERIOUS QUESTIONS GOING TO THE MERITS	14
A. Cooper's Undue Delay and the Balance of Hardships	14
B. Merits	23
1. California's Lethal-injection Protocol Does Not Create a Risk of Masking a Painful Death	28
2. Cooper's Complaints Regarding California's Protocol Are Indistinguishable From Challenges to Other States' Protocols That Have Been Consistently Rejected by State and Federal Courts	31
3. Cooper Has Not Been Denied Due Process Based on San Quentin's Lethal-injection Protocol	36

TABLE OF CONTENTS (continued)

	Page
CONCLUSION	39
STATEMENT OF RELATED CASES	40

TABLE OF AUTHORITIES

	Page
Cases	
Andreiu v. Ashcroft 253 F.3d 477 (9th Cir. 2001)	22
Andrews v. Shulsen 802 F.2d 1256 (10th Cir. 1986) *cert. denied*, 485 U.S. 919 (1986)	27
Beck v. Rowsey 540 U.S. ___ (No. 03A576, 1/8/04, North Carolina)	19, 20
Bruce v. Johnson 540 U.S. ___ (No. 03A594, 1/14/04, Texas)	19, 20
Buchanan v. Gilmore 139 F.3d 982 (4th Cir. 1998)	15
Calderon v. Thompson 523 U.S. 538 118 S. Ct. 1489 140 L. Ed. 2d 728 (1998)	21, 22
Campbell v. Wood 18 F.3d 662 (9th Cir. 1994) *cert. denied*, 511 U.S. 118 (2001)	25, 35
Carr v. State 655 So.2d 824 (Miss. 1995) *cert. denied*, 516 U.S. 1076 (1995)	26

TABLE OF AUTHORITIES (continued)

	Page
Cooper v. Calderon ___ U.S. ___ 123 S. Ct. 1793 (2003)	11
Cooper v. Calderon 255 F.3d 1104 (9th Cir. 2001) *cert. denied*, 537 U.S. 861 (2002)	9, 10
Cooper v. Calderon 274 F.3d 1270 (9th Cir. 2001)	9, 10
Cooper v. Calderon 308 F.3d 1020 (9th Cir. 2002) *cert. denied*, ___ U.S. ___ 123 S. Ct. 1793 (2003)	9
Cooper v. Calderon 524 U.S. 963 118 S. Ct. 2392 141 L. Ed. 2d 757 (1998)	7
Cooper v. Calderon 537 U.S. 861 (2002)	10
Cooper v. California 502 U.S. 1016 112 S. Ct. 664 116 L. Ed. 2d 755 (1991)	5
Cooper v. California 528 U.S. 897 120 S. Ct. 229 145 L. Ed. 2d 192 (1999)	8

TABLE OF AUTHORITIES (continued)

	Page
County of Sacramento v. Lewis 523 U.S. 833 118 S. Ct. 1708 140 L. Ed. 2d 1043 (1998)	37
Dawson v. State 673 A.2d 1186 (Del. 1996) *cert. denied*, 519 U.S. 844 (1996)	26
Estelle v. Gamble 429 U.S. 97 97 S. Ct. 285 50 L. Ed. 2d 251 (1976)	23
Ex parte Granviel 561 S.W. 503 (1978)	27, 32, 38
Fierrro v. Gomez 77 F.3d 301 (9th Cir.) *vacated on other grounds*, 519 U.S. 918 (1996)	15
Gomez v. U.S. Dist. Ct. N.D. Cal. 503 U.S. 653 112 S. Ct. 1652 118 L. Ed. 2d 293 (1992)	2, 15
Gregg v. Georgia 428 U.S. 153 96 S. Ct. 2909 49 L. Ed. 2d 859 (1976)	23, 35
Harrison v. State 644 N.E.2d 1243 (Ind. 1995)	26

TABLE OF AUTHORITIES (continued)

	Page
Harvey v. Horan 278 F.3d 370 (4th Cir. 2002)	15
Heckler v. Chaney 470 U.S. 821 105 S. Ct. 1649 84 L. Ed. 2d 714 (1985)	16, 33
Hill v. Hopper 112 F.3d 1088 (11th Cir. 1997)	15
Hill v. Lockhart 791 F. Supp. 1388 (E.D.Ark. 1992)	16, 27, 33
Hopkinson v. State 798 P.2d 1186 (Wyo. 1990)	27
In re Cooper ___ U.S. ___ 123 S. Ct. 1793 (2003)	11
In re Cooper ___ U.S. ___ 124 S. Ct. 92 (2003)	11
In re Kemmler 136 U.S. 436 10 S. Ct. 930 34 L. Ed. 2d 524 (1890)	24
Jiminez v. Barber 252 F.2d 550 (9th Cir. 1958)	4

TABLE OF AUTHORITIES (continued)

	Page
Johnson v. Reid 540 U.S. ___ (No. 03A513, 12/18/03, Virginia)	20
Johnson v. State Bd. of Accountancy 72 F.3d 1427, 1430 (9th Cir. 1995)	38
Kelly v. Lynaugh 862 F.2d 1126 (5th Cir. 1988) *cert. denied*, 492 U.S. 925	27
LaGrand v. Lewis 883 F.Supp. 469, 470-71 (D.Ariz. 1995) *affirmed*, 133 F.3d 1253 (9th Cir. 1998) *cert. denied*, 525 U.S. 1050	27, 31, 35
Lambright v. Lewis 932 F.Supp. 1547 (D. Ariz. 1996) *aff'd in part and remanded en banc sub nom.* *Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999)	27
Miller v. California Pacific Medical Center 19 F.3d 449 (9th Cir. 1994)	4
Nelson v. Campbell ___ U.S. ___ 124 S. Ct. 835 72 U.S.L.W. 3362 72 U.S.L.W. 3371 (Dec. 1, 2003)	19
Nelson v. Campbell 286 F. Supp. 1321 (M.D.Ala. 2003)	19
People v. Bradford 14 Cal. 4th 1005 (1997)	26

TABLE OF AUTHORITIES (continued)

	Page
People v. Fairbank 16 Cal. 4th 1223 (1997)	26
People v. Holt 15 Cal. 4th 619 (1997)	26
People v. Kevin Cooper 53 Cal. 3d 771 809 P.2d 865 281 Cal. Rptr. 90 (1991)	5
People v. Snow 30 Cal. 4th 43 (2003)	26
People v. Stewart 121 Ill.2d 93 117 Ill. Dec. 187 520 N.E.2d 348, *cert. denied*, 488 U.S. 900 (1988)	27
People v. Stewart 520 N.E.2d 348 (Ill. 1988) *cert. denied*, 488 U.S. 900 (1988)	26
People v. Welch 20 Cal. 4th 701 (1999)	26
Poland v. Stewart 117 F.3d 1094 (9th Cir. 1997) *cert. denied*, 523 U.S. 1082	27, 35
Robinson v. Crosby 540 U.S. ___ (No. 03A653, 2/4/04, Florida)	18, 20

TABLE OF AUTHORITIES (continued)

	Page
Roe v. Anderson 134 F.3d 1400 (9th Cir. 1998)	4
Roe v. Taft 540 U.S. ___ (No. 03A650, 2/2/04, Ohio)	18, 20
Romano v. State 917 P.2d 12 (Ok. 1996)	26
Rupe v. Wood 93 F.3d 1434 (9th Cir. 1996) *cert. denied*, 519 U.S. 1142 (1996)	27
Russell v. State 849 So.2d 95 (Miss. 2003)	26
Sims v. State 754 So.2d 657 (Fla.) *cert. denied*, 528 U.S. 1183 (2000)	3, 17, 26, 29, 31, 33
Sivak v. State 731 P.2d 192 (Idaho 1986)	26
Spencer v. Commonwealth, 238 Va. 563 385 S.E.2d 850 (Va. 1989) *cert. denied*, 493 U.S. 1093 (1989)	27
State of La. ex rel. Francis v. Resweber 329 U.S. 459 67 S. Ct. 374 91 L. Ed. 2d 422 (1947)	24

TABLE OF AUTHORITIES (continued)

	Page
State v. Deputy 644 A.2d 411 (Del. 1994)	17, 36
State v. Gollehon 864 P.2d 249 (Mont. 1993) *cert. denied*, 513 U.S. 827 (1995)	26
State v. Hinchey 890 P.2d 602 (Ariz. 1995)	17, 26, 33
State v. Hines 919 S.W.2d 573 (Tenn. 1995) *cert. denied*, 519 U.S. 847 (1995)	27
State v. Moeller 548 N.W.2d 465 (S.D. 1996)	27
State v. Moen 309 Or. 45 786 P.2d 111 (1990)	16, 27
State v. Webb 252 Conn. 128 750 A.2d 448 (2000) *cert. denied*, 521 U.S. 1183 (2000)	3, 17, 26, 27, 29, 31-34
State v. Webb 680 A.2d 147 (Conn. 1996)	26
Thorburn v. Department of Corrections 66 Cal. App. 4th 1284 (1998)	31

TABLE OF AUTHORITIES (continued)

	Page
Trop v. Dulles 356 U.S. 86, 101 78 S. Ct. 590 2 L. Ed. 2d 630 (1958)	23, 24
U.S. v. Chandler 950 F.Supp. 1545 (N.D. Ala. 1996) *affm.* 218 F.3d 1305 *cert. denied,* 531 U.S. 1204 (1997)	27
United States v. Lanier 520 U.S. 259 117 S. Ct. 1219 137 L. Ed. 2d 432 (1997)	36
Vickers v. Johnson 540 U.S. ___ (No. 03A633, 1/28/04, Texas)	19, 20
Ward et al. v. Darks 540 U.S. ___ (No. 03A584, 1/13/04, Oklahoma)	19, 20
Williams et al. v. Taft 540 U.S. ___ (No. 03A590, 1/13/04, Ohio)	19, 20
Woolls v. McCotter 798 F.2d 695 (5th Cir. 1986) *cert. denied,* 478 U.S. 1032 (1986)	16
Zepeda v. United States I.N.S. 753 F.3d 719 (9th Cir. 1983)	4
Zimmerman v. Johnson 540 U.S. ___ (No. 03A606, 1/21/04, Texas)	19, 20

TABLE OF AUTHORITIES (continued)

Page

Constitutional Provisions

United States Constitution
VIII Amendment 11, 12, 16, 17, 23, 24, 38
XIV Amendment 36

Statutes

Antiterrorism and Effective Death Penalty Act ("AEDPA")
Pub. L. No. 104-132, 110 Stat. 1214 (1996) 15

28 C.F.R. § 26.3(4) 25

28 U.S.C. § 2254 15

42 U.S.C. § 1983 2, 12, 14, 15, 18

Ala. Code 1975 § 15-18-82 25

Ariz. Rev. Stat. Ann. § 13-704 25

Ariz. Rev. Stat. Ann. §13-704 24

Ark. Code Ann. § 5-4-617 25

Army Reg. 190-55 25

California Penal Code
§ 3604 (*amended by* Stats.1992, c.558 (A.B. 2405) § 2,
amended by Stats. 1996, c.84 (A.B. 2082) § 1) 15, 24, 25

Colo. Rev. Stat. Ann. § 16-11-401 25

TABLE OF AUTHORITIES (continued)

	Page
Conn. Gen. Stat. § 54-100	25
Del. Code Ann. tit. 11, § 4209(f)	25
Fla. Stats. § 922.105	25
Ga. Code Ann., § 17-10-38	25
Idaho Code § 19-2716	25
Idaho Code §§ 19-2716	24
Ill. St. ch. 725, § 5/119-5 (a)(1)	25
Ind. Code Ann. § 35-38-6-1	25
Kan. Stat. Ann. § 22-4001	25
Ky. Rev. Stat. § 431.220	25
La. Rev. Stat. Ann. § 15:569 B	25
Md. Code Ann., Corr. § 3-905	25
Miss. Code Ann. § 99-19-51 (1972)	25
Mo. Rev. Stat. § 546.720	25
Mont. Code Ann. § 46-19-103	25
Mont. Code Ann. § 46-19-103(3)	24
N.C. Gen. Stat. § 15-187	25

TABLE OF AUTHORITIES (continued)

	Page
N.H. Rev. Stat. Ann. § 630:5 XIII	25
N.J. Stat. Ann. § 2C:49-2	25
N.M. Stat. Ann. § 31-14-11	25
N.Y. Correct. Law § 658	25
Nev. Rev. Stat. § 176.335	24
Nev. Rev. Stat. § 176.355 1	25
Ohio Rev. Code Ann. § 2949.22(B)(1)	25
Okla. Stat. Ann. tit. 22 § 1014	25
Or. Rev. Stat. Ann. § 137.473	25
Or. Rev. Stat. § 137.473	24
Pa. Stat. Ann. tit. 61 § 3004	25
S.C. Code § 24-3-530	25
S.D. Codified Laws § 23A-27A- 32	25
Tenn. Code Ann. § 40-23-114	25
Texas Code Crim. P. Ann. § 43.14	25
Utah Code Ann. § 77-18-5.5	25
Va. Code § 53-1-233	25

TABLE OF AUTHORITIES (continued)

	Page
Wash. Rev. Code Ann. § 10.95.180	25
Wash. Rev. Code § 10.95.180	25
Wyo. Stat. Ann. § 7-13-904	25

Other Authorities

Bureau of Justice Statistics Bulletin Capital Punishment 2002 Nov. 2003, NCJ201848	26, 37

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Appellees respectfully submit this Opposition to Kevin Cooper's motion before this Court for a stay of execution following the denial of his motion before the United States District Court for a Temporary Restraining Order enjoining his execution scheduled for February 10, 2004.

INTRODUCTION

Kevin Cooper is scheduled for execution next Tuesday, February 10, 2004 – some 20 years after he murdered Douglas and Peggy Ryen, their 10-year-old daughter Jessica, and an 11-year-old house guest, Christopher Hughes.

Five days ago, on Monday, February 2, 2004, Cooper filed an action under 42 U.S.C. § 1983 in the United States District Court for the Northern District of California, challenging California's use of lethal injection as cruel and unusual punishment. He sought a temporary restraining order and preliminary injunction to prevent state officials from carrying out the scheduled execution. He also sought "expedited discovery."

Following briefing and hearing, the District Court issued an Order on February 6, 2004, denying Cooper's motion for injunctive relief and discovery. The Court found that Cooper had unduly delayed presenting his claim and that his proffered explanation for that delay was inadequate under applicable law. Order at 2-3 (citing *Gomez v. U.S. Dist. Ct. N.D. Cal.*, 503 U.S. 653, 653-654, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992) [holding that a court may consider the last-minute nature of a stay application in deciding whether to grant equitable relief]). In addition, the Court observed that "[e]ven if Plaintiff's delay in bringing this action were to be ignored or excused, this Court would find and conclude that Plaintiff has not met his burden of demonstrating either the likelihood of success on the merits or the existence of serious questions going to the merits." (E.R.[1/] at 11-12 [observing that "every state and federal court that has considered the issue has

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1. The excerpts of record filed by Cooper are referenced herein as "E.R."

concluded that lethal injection is constitutional"]; *see also State v. Webb*, 252 Conn. 128, 750 A.2d 448, 453-457 (Conn.), *cert. denied*, 521 U.S. 1183 (2000) [rejecting, on a fully developed record, challenge to lethal-injection protocol that, like California's, includes the use of both sodium pentothal and pancuronium bromide {"Pavulon"}], and *Sims v. State*, 754 So.2d 657 (Fla.), *cert. denied*, 528 U.S. 1183 (2000) [same], *cited in* E.R. at 12.) Likewise, in no other respect had Cooper demonstrated likelihood of success on the merits or any serious question going to the merits of his challenge to California's lethal-injection protocol. (E.R. at 12-13.)

Having failed below to establish any valid basis for thwarting his scheduled execution, Cooper turns to this Court and pursues the same objective. In doing so, he mostly relies on the very arguments that proved unavailing in the District Court.[2/] Indeed, Cooper's primary arguments here, like those he advanced below, are materially indistinguishable from those trotted out in a series of unsuccessful efforts to block nine scheduled executions in five states over the past

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2. To the extent Cooper's Motion for Stay and Opening Brief on appeal from the District Court's Order denying the TRO advance arguments and assertions never presented to the District Court, they have no bearing on the correctness of the District Court's ruling, and thus no bearing on this Court's determination whether the District Court committed any abuse of discretion.

five weeks. Cooper's challenge – just the latest in a series of these copy-cat lawsuits – furnishes no lawful basis for impeding the state's legal processes.

STANDARD OF REVIEW

The question whether a temporary restraining order or preliminary injunction should issue is addressed to the sound discretion of the district court. *See Miller v. California Pacific Medical Center*, 19 F.3d 449, 455 (9th Cir. 1994) (en banc); *Jiminez v. Barber*, 252 F.2d 550 (9th Cir. 1958). A district court does not abuse its discretion unless: (1) it applies incorrect substantive law or an incorrect standard for issuance of a temporary restraining order; (2) it rests the decision on a clearly erroneous finding of fact that is material to the decision to grant or deny relief; or (3) it applies the correct standard in a manner that results in an abuse of discretion. *Zepeda v. United States I.N.S.*, 753 F.3d 719, 724 (9th Cir. 1983). In considering whether to the grant the injunctive relief Cooper sought below (and continues to seek by his instant motion), the District Court was required to determine whether Cooper, as the moving party, had shown either (1) a likelihood of success on the merits and the possibility of irreparable harm or (2) the existence of serious question going to the merits and the balance of hardships tipping in his favor. *See Roe v. Anderson*, 134 F.3d 1400, 1401-1402 (9th Cir. 1998).

PROCEDURAL & FACTUAL BACKGROUND

Cooper pleaded guilty to escape from a state prison. While hiding from authorities, he entered the Ryens' home, and brutally Douglas and Peggy Ryen, their daughter, and their house guest, 11-year-old Christopher Hughes. Following a jury trial, he was convicted of four counts of first degree murder. He was also convicted of attempting to murder the Ryens' eight-year-old son Joshua, the severely wounded sole survivor. The jury fixed the penalty as death, and on May 15, 1985, the trial court sentenced Cooper accordingly.

On May 6, 1991, the California Supreme Court affirmed the judgment of conviction and sentence of death. *People v. Kevin Cooper*, 53 Cal. 3d 771, 809 P.2d 865, 281 Cal. Rptr. 90 (1991). On June 26, 1991, the California Supreme Court denied Cooper's petition for rehearing and issued its remittitur. On December 16, 1991, the United States Supreme Court denied Cooper's first petition for writ of certiorari. *Cooper v. California*, 502 U.S. 1016, 112 S. Ct. 664, 116 L. Ed. 2d 755 (1991).

On March 24, 1992, Cooper requested appointment of counsel and a stay of execution from the United States District Court for the Southern District of California. On March 26, 1992, the first in a series of stays of execution was issued by the District Court in case number 92-CV-427.

On August 11, 1994, Cooper filed his first federal petition for writ of habeas corpus in the District Court. On October 13, 1994, the State filed a motion to dismiss the petition for failure to exhaust state remedies. On December 20, 1994, the District Court denied the motion to dismiss and granted Cooper a stay to permit exhaustion of administrative remedies.

On April 4, 1996, Cooper filed his first of seven state petitions for writ of habeas corpus in the California Supreme Court. The state court denied the petition on February 19, 1997. *In re Cooper*, case no. S052741.

On March 12, 1997, Cooper filed his first motion to recall the remittitur in the direct appeal in the California Supreme Court. The California Supreme Court denied Cooper's motion on March 26, 1997. *People v. Cooper*, case no. S004687.

On April 12, 1997, Cooper filed an amended petition for writ of habeas corpus in the District Court, and on June 20, 1997, he filed a supplemental petition. On August 25, 1997, following an evidentiary hearing, the District Court denied Cooper's first petition. *Cooper v. Calderon*, case no. 92-CV-427. On September 16, 1997, Cooper filed objections to the entry of judgment in the District Court, and a motion to "clarify certain issues." Cooper's motion was

deemed a motion for reconsideration and denied by the District Court on November 7, 1997.

On September 12, 1996, Cooper filed his second state petition for writ of habeas corpus in the California Supreme Court. *In re Cooper*, case no. S064320. On September 30, 1997, Cooper filed his second motion to recall the remittitur in the California Supreme Court. *People v. Cooper*, case no. S004687. The California Supreme Court denied Cooper's petition and motion on October 15, 1997.

On April 26, 1998, during the pendency of his appeal to this Court from the District Court's denial of his first federal habeas petition, Cooper filed a second petition for writ of certiorari in the United States Supreme Court in case number 97-8837 regarding the District Court's denial of his first federal petition for writ of habeas corpus. On June 26, 1998, the United States Supreme Court denied the petition. *Cooper v. Calderon*, 524 U.S. 963, 118 S. Ct. 2392, 141 L. Ed. 2d 757 (1998).

On April 30, 1998, Cooper filed a second federal petition for writ of habeas corpus in the District Court in case number 98-CV-818. On June 15, 1998, the District Court dismissed Cooper's second federal petition for writ of habeas corpus. *Cooper v. Calderon*, case no. 98-CV-818. On June 25, 1998, Cooper

filed a motion in the District Court to alter or amend the judgment dismissing his second federal petition for writ of habeas corpus. On June 30, 1998, the District Court denied Cooper's motion. *Cooper v. Calderon*, case no. 98-CV-818.

On December 23, 1998, Cooper filed his third state petition for writ of habeas corpus in the California Supreme Court. *In re Cooper*, case no. S075527. On March 15, 1999, Cooper filed a supplemental petition for writ of habeas corpus in the California Supreme Court in his third state habeas proceeding. *In re Cooper*, case no. S075527. On March 26, 1999, while his third state habeas petition was still pending, Cooper filed a fourth state habeas corpus petition in the California Supreme Court. *In re Cooper*, case no. S077408. On April 14, 1999, the California Supreme Court denied Cooper's third and fourth state petitions for writ of habeas corpus. On May 7, 1999, Cooper filed a motion for clarification of rulings regarding his fourth state petition for writ of habeas corpus. The motion was denied on May 12, 1999. *In re Cooper*, case no. S077408.

On July 9, 1999, Cooper filed a third petition for writ of certiorari in the United States Supreme Court in case number 99-5303, challenging the denial of his third state habeas petition by the California Supreme Court. This Court denied the petition on October 4, 1999. *Cooper v. California*, 528 U.S. 897, 120 S. Ct. 229, 145 L. Ed. 2d 192 (1999).

The District Court's denial of Cooper's first federal habeas petition was affirmed by this Court on December 15, 2000. *Cooper v. Calderon*, case no. 97-99030. On July 9, 2001, this Court withdrew its decision and granted Cooper's petition for rehearing and issued a memorandum affirming the denial of Cooper's first federal habeas petition. *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001), *cert. denied*, 537 U.S. 861 (2002). On August 29, 2001, Cooper filed a petition for rehearing and rehearing en banc. On January 8, 2002, this Court denied the petition. *Cooper v. Calderon*, case no. 97-99030.

On December 21, 2001, this Court denied Cooper's request for authorization to file a second petition for writ of habeas corpus to raise a claim of ineffective assistance of trial counsel based on a failure to investigate and present evidence regarding an inmate's hearsay claim that another inmate confessed to the Ryen/Hughes murders. *Cooper v. Calderon*, 274 F.3d 1270 (9th Cir. 2001). Cooper's petition for rehearing and rehearing en banc was denied by this Court on October 18, 2002. *Cooper v. Calderon*, 308 F.3d 1020 (9th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 1793 (2003). On November 21, 2002, this Court denied Cooper's motion to reconsider or vacate the order denying his motion to stay the mandate pending the filing of a petition for writ of certiorari and request

for en banc review regarding the denial of authorization to file a second federal habeas petition. *Cooper v. Calderon*, case no. 98-99023.

On April 18, 2002, Cooper filed his fourth petition for writ of certiorari in the United States Supreme Court in case number 01-10742, which challenged this Court's affirmance of the District Court's denial of Cooper's first federal petition for writ of habeas corpus. *See Cooper*, 255 F.3d 1104. On October 7, 2002, the United States Supreme Court denied the petition. *Cooper v. Calderon*, 537 U.S. 861 (2002).

On February 14, 2003, this Court denied Cooper authorization to file a third federal petition for writ of federal habeas corpus in the District Court. *Cooper v. Calderon*, case no. 99-71430. On April 7, 2003, this Court denied Cooper's petition for rehearing and rehearing en banc from the denial of authorization to file a third federal petition for writ of habeas corpus.

On February 11, 2003, Cooper filed a petition for writ of habeas corpus in the United States Supreme Court in case number 02-9051, presenting the same underlying claim that was the subject of this Court's denial of authorization to file a second petition for writ of habeas corpus in the District Court. *See Cooper*, 274 F.3d at 1272. The United States Supreme Court denied the petition for writ

of habeas corpus on April 21, 2003. *In re Cooper*, ___ U.S. ___, 123 S. Ct. 1793 (2003).

On February 20, 2003, Cooper filed a fifth petition for writ of certiorari in the United States Supreme Court in case number 02-9050, regarding this Court's denial of authorization to file a second federal habeas petition in the District Court. On April 21, 2003, the United States Supreme Court denied the petition. *Cooper v. Calderon*, ___ U.S. ___, 123 S. Ct. 1793 (2003).

On May 15, 2003, Cooper filed his second petition for writ of habeas corpus in the United States Supreme Court in case number 02-10760. The United States Supreme Court denied the petition on October 6, 2003. *In re Cooper*, ___ U.S. ___, 124 S. Ct. 92 (2003).

On June 13, 2003, the San Diego County Superior Court denied Cooper's petition for writ of habeas corpus alleging mental retardation. On July 2, 2003, following an evidentiary hearing, the San Diego County Superior Court denied Cooper's motions relating to post-conviction DNA testing.

On June 24, 2003, Cooper filed his fifth state petition for writ of habeas corpus in the California Supreme Court claiming that: (1) his execution would violate the Eighth Amendment because he is mentally retarded; and (2) in the alternative, he was entitled to a new sentencing hearing to permit consideration of

mitigating evidence of his mental retardation based on this Court's holdings in *Ring v. Arizona*. On October 22, 2003, the California Supreme Court denied the petition. *In re Cooper*, case no. S116984.

On July 22, 2003, Cooper filed a petition for writ of mandate in the California Supreme Court, relating to the denial of his post-conviction DNA motion. *Cooper v. Superior Court*, case no. S117675. The California Supreme Court denied the motion on October 22, 2003.

On September 2, 2003, Cooper filed a third motion to recall the remittitur in the California Supreme Court. On October 22, 2003, the California Supreme Court denied the motion. *People v. Cooper*, case no. S004687.

On January 20, 2004, Cooper filed his sixth petition for writ of certiorari in the United States Supreme Court, in case number 03-8513, presenting a *Ring* claim that was the subject of the California Supreme's Court's denial of his fifth state petition for writ of habeas corpus. *Cooper v. California*, case no. 03-8513.

On February 2, 2004, Cooper filed a complaint in the United States District Court for the Northern District of California, pursuant to 42 U.S.C. § 1983, seeking a temporary restraining order, preliminary injunction, and expedited discovery on a claim that California's use of lethal injection violates the Eighth Amendment. (E.R. at 15.) On February 6, 2004, Jeremy Fogel, United

States District Judge, issued an order denying the motions for temporary restraining order, preliminary injection, and expedited discovery. (E.R. at 8-14.)

On February 2, 2004 – the same day he filed his lethal-injection challenge in the District Court – Cooper filed his sixth petition for writ of habeas corpus and an emergency application for a stay of execution in the California Supreme Court. The petition was denied on the merits on February 6, 2004, *In re Cooper*, case no. S1222389, after which Cooper sought to supplement it with additional exhibits. The state supreme court treated the supplemental as a new petition (Cooper's seventh), and the state filed opposition papers and exhibits on February 6 and 7.

After the courts closed on February 6, Cooper sought leave from this Court to file yet another successive federal petition. The state filed written opposition to that application the following morning, and it remains pending. He filed the instant emergency motion yesterday, February 7, 2004.

On February 8, 2004, Cooper filed his seventh petition for writ of certiorari in the United States Supreme Court, relating to the California Supreme Court's denial of his sixth state habeas petition.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING COOPER'S MOTION FOR A TEMPORARY RESTRAINING ORDER; COOPER HAS FAILED TO ESTABLISH GOOD CAUSE FOR BRINGING HIS ELEVENTH-HOUR CHALLENGE; COOPER HAS ALSO FAILED TO MEET HIS BURDEN OF DEMONSTRATING EITHER LIKELIHOOD OF SUCCESS ON THE MERITS OR THE EXISTENCE OF SERIOUS QUESTIONS GOING TO THE MERITS

A. Cooper's Undue Delay and the Balance of Hardships

When condemned inmate Robert Alton Harris filed an action pursuant to 42 U.S.C. § 1983 claiming scheduled execution by lethal gas constituted cruel and unusual punishment, the High Court concluded as follows:

> Whether his claim is framed as a habeas petition or as a § 1983 action, Harris seeks an equitable remedy. Equity must take into consideration the State's strong interest in proceeding with its judgment and Harris' obvious attempt at manipulation. [Citations omitted.] This claim could have been brought more than a decade ago. There is no good reason for this abusive delay, which has been compounded by last-minute attempts to manipulate the judicial process. A court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief.

Gomez, 503 U.S. at 653-654.[3/] The District Court did not abuse its discretion in refusing to "ignore such clear guidance from the Supreme Court." (E.R. at 10.)

Lethal injection has been an authorized method of execution in California since 1992, and the presumptive method since 1996. Cal. Penal Code § 3604, *amended by* Stats.1992, c.558 (A.B. 2405) § 2, *amended by* Stats. 1996, c.84 (A.B. 2082) § 1. Nine inmates have since been executed by that method. Cooper has been aware of California's use of lethal injection for years. He has brought no less than seven petitions for writ of habeas corpus in the California Supreme Court and never once challenged California's use of lethal injection. He has filed two habeas petitions in federal district court, and sought authorization from this Court to file another two; in no instance, however, did he pursue an attack on

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3. Like Harris, Cooper styled his attack on California's method of execution as a civil rights suit. While mindful of this Court's pronouncements in *Fierrro v. Gomez*, 77 F.3d 301, 305-306 (9th Cir.), *vacated on other grounds*, 519 U.S. 918 (1996), defendants dispute the propriety of Cooper's resort to § 1983 in these circumstances. *See, e.g., Hill v. Hopper,* 112 F.3d 1088 (11th Cir. 1997); *Harvey v. Horan*, 278 F.3d 370, 374-380 (4th Cir. 2002); *Buchanan v. Gilmore*, 139 F.3d 982, 983-984 (4th Cir. 1998). If construed as a habeas corpus proceeding (as it would be in some circuits), Cooper's challenge would merit immediate dismissal under the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). 28 U.S.C. § 2254(b)(2)(b)(ii). In the end, however, it makes no difference how Cooper packages his attack on lethal injection, for in all events he seeks an equitable remedy, and *Gomez* makes it clear that "[e]quity must take into account the State's strong interest in proceeding with its judgment and [Cooper's] obvious attempt at manipulation." Viewed in that light, Cooper's lack of entitlement to equitable relief is plain.

lethal injection. Cooper has also filed six petitions for writ of certiorari and two petitions for writ of habeas corpus in the United States Supreme Court, but never so much as hinted at any constitutional basis for challenging California's use of lethal injection. To paraphrase *Gomez,* "There is no good reason" for Cooper's failure to bring his challenge more than a decade earlier.[4/]

Legal challenges to lethal injection are nothing new; indeed, they have been repeatedly raised and uniformly rejected for nearly two decades. *See Heckler v. Chaney*, 470 U.S. 821, 823, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985) (claim in civil suit that drugs used for execution by lethal injection not appropriately tested and likely to be administered by untrained personnel); *Woolls v. McCotter*, 798 F.2d 695, 697-698 (5th Cir. 1986), *cert. denied*, 478 U.S. 1032 (1986) (claim administration of sodium thiopental by untrained personnel in improper dosage violates Eighth Amendment); *State v. Moen*, 309 Or. 45, 786 P.2d 111, 143 (1990) (claim chemicals used by state violate Eighth Amendment); *Hill v. Lockhart*,

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4. Cooper's judgment of conviction and sentence of death were affirmed on direct appeal in 1991. Accordingly, he had standing to challenge methods of execution at least since then. Cooper's belatedly-concocted theory, AOB 9, that California "erected a statutory scheme that allows a 30-day window in which an inmate can bring suit" challenging methods of execution is as frivolous as his suggestion that "[t]here has been no delay, other than that caused by the District Attorney's Office and the California Court." AOB 18; *see also* AOB 18 ("It should be recalled that the District Attorney waited several years before seeking an execution date").

791 F. Supp. 1388, 1394 (E.D.Ark. 1992) (possible difficulty locating a vein suitable for lethal injection claimed to be cruel and unusual punishment); *State v. Deputy*, 644 A.2d 411 (Del. 1994) (claim that state's procedures for lethal injection unconstitutional by failing to provide appropriate selection and training of persons administering lethal injection); *State v. Hinchey*, 890 P.2d 602 (Ariz. 1995) (lethal injection allegedly unconstitutional because if carried out incorrectly it could be painful); *State v. Webb*, 252 Conn. 128, 138, 750 A.2d 448 (2000), *cert. denied*, 531 U.S. 835 (2000) (claim lethal injection creates a "high risk" inmate will experience "excruciating pain" because execution protocol does not ensure sufficient amount of thiopental sodium will be administered to render inmate unconscious); *Sims v. State*, 754 So.2d 657 (Fla. 2000), *cert. denied*, 528 U.S. 1183 (2000) (claim lack of specific guidelines controlling the dosage, sequence, and delivery rates of lethal chemicals violates Eighth Amendment). Despite the existence of nearly two decades of legal precedent identifying challenges made to execution by lethal injection, Cooper failed to raise any challenge to California's use of lethal injection in either state or federal court until the week before his scheduled execution.

If Cooper's purpose to manipulate the judicial system were not clear enough from the fact of his abusive delay alone, his attorneys' own words leave

no doubt. On October 23 of last year, they wrote to the California Attorney General and the San Bernardino District Attorney to inform them both of the following:

> We have received information that the chemicals used in lethal injection in California mask extreme trauma and suffering, and that this issue has gained prominence in Tennessee and elsewhere. We would like to determine if you are willing to consider other methods of execution that meet the 8th Amendment standard. Please advise, as ***this will be the focus of the next motion***.

(Ex. A, emphasis added.)

Cooper's failure to present his challenge for another four months – waiting until just one week before his scheduled execution – betrays his improper motives in initiating this last-minute litigation.[5/]

In recent weeks, the United States Supreme Court has intervened in several capital cases, denying or vacating stays as appropriate, as condemned inmates around the Country have filed last-minute actions pursuant to 42 U.S.C. § 1983 raising equally baseless challenges to lethal injection. *Robinson v. Crosby*, 540 U.S. ___ (No. 03A653, 2/4/04, Florida) (stay of execution denied); *Roe v.*

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5. We also note that although Cooper did not file his papers with the District Court until Monday, February 2, 2004, he had them prepared for filing earlier, ***before*** the Governor denied his application for clemency on January 30, 2004. (*See, e.g.*, E.R. at 71:18 ["unless executive clemency or a stay of execution is issued . . . ."].)

Taft, 540 U.S. ___ (No. 03A650, 2/2/04, Ohio) (stay of execution denied); *Vickers v. Johnson*, 540 U.S. ___ (No. 03A633, 1/28/04, Texas) (stay of execution denied); *Zimmerman v. Johnson*, 540 U.S. ___ (No. 03A606, 1/21/04, Texas) (stay of execution denied); *Bruce v. Johnson*, 540 U.S. ___ (No. 03A594, 1/14/04, Texas) (stay of execution denied); *Ward et al. v. Darks*, 540 U.S. ___ (No. 03A584, 1/13/04, Oklahoma) (stay of execution vacated); *Williams et al. v. Taft*, 540 U.S. ___ (No. 03A590, 1/13/04, Ohio) (stay of execution denied); *Beck v. Rowsey*, 540 U.S. ___ (No. 03A576, 1/8/04, North Carolina) (stay of execution vacated).[6/]

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6. The only pending grant of certiorari relating to the use of lethal injection presents the following question:

> Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the procedures for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?

Nelson v. Campbell, ___ U.S. ___, 124 S. Ct. 835, 72 U.S.L.W. 3362, 72 U.S.L.W. 3371 (Dec. 1, 2003).

The open question to be resolved in *Nelson* concerns whether a condemned inmate may use a civil rights action, rather than habeas corpus, to challenge the state's procedures for carrying out an execution, and thereby circumvent the strict limitations on filing successive habeas petitions. (*See generally* note 2.) The precise circumstances presented in *Nelson* are instructive. There, the inmate suffered from a unique medical condition that made it likely that a "cut down" procedure would be necessary. *Nelson v. Campbell*, 286 F. Supp. 1321 (M.D.Ala.

(continued...)

These events surrounding these copy-cat lawsuits confirm that Cooper is not entitled to equitable relief based on his belated challenge to lethal injection, for just as the "questions" raised in those other cases were no less "serious" as those presented by Cooper, the "balance of hardships" in those cases also "tipped" no differently.

Indeed, in those cases, as here, the equities undeniably favor the State. Federal jurisprudence reflects an "enduring respect for 'the State's interest in the finality of convictions that have survived direct review within the state court

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6. (...continued)
2003) (state conceded that due to Nelson's intravenous drug use, the condition of his veins made a "cut-down" procedure possible); *see also Johnson v. Reid*, 540 U.S. ___ (No. 03A513, 12/18/03, Virginia). Cooper, on the other hand, is presenting a generic attack on California's method of execution of the variety that could be raised by *any* prisoner. Cooper's very different circumstances (Cooper faces no prospect of a cut-down – ***and he knows it***: Ex. B) would defeat any suggestion that the merits of his claim will be affected by the decision in *Nelson*. Indeed, the recent actions of the United States Supreme Court fortify the conclusion that Cooper's claims do not warrant a stay of execution. Condemned inmates bringing equally meritless challenges in the eleventh hour have been denied stays of execution by the High Court, and stays of execution issued by lower courts have been vacated. *See Robinson v. Crosby*, 540 U.S. ___ (No. 03A654, 2/4/04, Florida) (stay of execution denied); *Roe v. Taft*, 540 U.S. ___ (No. 03A650, 2/2/04, Ohio) (stay of execution denied); *Vickers v. Johnson*, 540 U.S. ___ (No. 03A633, 1/28/04, Texas) (stay of execution denied); *Zimmerman v. Johnson*, 540 U.S. ___ (No. 03A606, 1/21/04, Texas) (stay of execution denied); *Bruce v. Johnson,* 540 U.S. ___ (No. 03A594, 1/14/04, Texas) (stay of execution denied); *Ward et al. v. Darks*, 540 U.S. ___ (No. 03A584, 1/13/04, Oklahoma) (stay of execution vacated); *Williams et al. v. Taft*, 540 U.S. ___ (No. 03A590, 1/13/04, Ohio) (stay of execution denied); *Beck v. Rowsey*, 540 U.S. ___ (No. 03A576, 1/8/04, North Carolina) (stay of execution vacated).

system.'" *Calderon v. Thompson*, 523 U.S. 538, 555, 118 S. Ct. 1489, 1503, 140 L. Ed. 2d 728 (1998). In addressing the compelling state interest in finality, the High Court observed:

> Only with an assurance of real finality can the State execute its moral judgment in a case. Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out. [Citation omitted.] To unsettle these expectations is to inflict a profound injury to the 'powerful and legitimate interest in punishing the guilty,' [citation omitted], an interest shared by the State and the victims of crime alike.

Id. at 556.[7]

Joshua Ryen was eight years old when Cooper murdered his father, mother, sister, and best friend with a hatchet and knife, and left him for dead after striking him with a hatchet and slitting his throat. Josh lay for about 12 hours in the bedroom of his parents, with his dead parents, sister, and friend. Cooper's rights have been the focus of two decades of litigation in which the fairness of his trial and validity of his conviction and sentence have been examined and repeatedly upheld in state and federal court. If Cooper had any genuine concern

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7. The District Court fully appreciated that the prospect of imminent execution presents an extraordinary "hardship." (E.R. at 13 n.4.) But contrary to Cooper's apparent understanding, the "hardship" of capital prisoners does not inexorably "far outweigh" the State's interest in having its capital statues enforced simply because "the State is free to re-set [an] execution" (Motion for Stay, at 5-6), for if that were accepted as a legal maxim, no execution would ever go forward in the face of a prisoner's persistence in presenting yet one more legal claim, and death penalty statutes would, in effect, become unenforceable.

regarding the constitutionality of his execution by lethal injection, he would have sought relief as soon as he became aware that he was subject to that method. Instead, as the letter from Cooper's counsel demonstrates, Cooper was well aware of his claim yet chose to deliberately wait until the week before his execution to file in the District Court with the hope of obtaining a stay of execution at the last minute. The District Court did not reward Cooper's attempt thwart his execution with last-minute litigation, and neither should this Court.

Whatever the strict applicability of AEDPA to challenges of the sort Cooper presents here (*see generally* note 2), those provisions must still inform a court's disposition of Cooper's belated demand for extraordinary and equitable relief. Indeed, the United States Supreme Court has held that even when a federal court considers a motion or action that is not subject to the restrictions of AEDPA, those provisions still "'certainly inform [its] consideration' of whether the Court of Appeals abused its discretion." *Calderon v. Thompson*, 523 U.S. at 558. As we have discussed, the traditional standard for injunctive relief involves a showing of a probability of success on the merits and possibility of irreparable harm, with serious legal issues raised and the balance of hardship tipped sharply in favor of the moving party. *Andreiu v. Ashcroft*, 253 F.3d 477, 483 (9th Cir. 2001). Cooper fails to satisfy that test. Inasmuch as application of this traditional standard for

interim injunctive relief must, under the circumstances of Cooper's challenge here, also be informed by AEDPA, denial of the requested relief follows *a fortiori.*

Cooper's guilt and punishment have been the subject of 20 years of litigation. Delaying Cooper's execution ostensibly to permit him to litigate his last-minute challenge to lethal injection would wholly subvert Congress's efforts to achieve meaningful reform of the process by which federal courts review state capital judgments.

B. Merits

Even putting aside Cooper's unjustifiable delay in presenting his claims, the District Court also determined that Cooper had failed to meet his burden of demonstrating either likelihood of success on the merits or the existence of serious questions going to the merits. The record before the District Court and this Court overwhelmingly confirms the correctness of that assessment.

The Eighth Amendment prohibits punishments that involve "'unnecessary and wanton inflictions of pain'" (*Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (plur. opn.)), or that are inconsistent with "evolving standards of decency that mark the progress of a maturing society" (*Estelle*, 429 U.S. at 102, quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590,

2 L. Ed. 2d 630 (1958)). Executing a person is not in and of itself cruel and unusual punishment within the meaning of the Eighth Amendment: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies something inhumane and barbarous, something more than mere extinguishment of life." *In re Kemmler*, 136 U.S. 436, 447, 10 S. Ct. 930, 34 L. Ed. 2d 524 (1890).

Although the Eighth Amendment does not prohibit the death penalty, it requires that the death penalty be performed in a manner that avoids unnecessary or wanton infliction of pain. *State of La. ex rel. Francis v. Resweber*, 329 U.S. 459, 463, 67 S. Ct. 374, 91 L. Ed. 2d 422 (1947). Any punishment must be consistent with human dignity and comply with current civilized standards. *Trop v. Dulles,* 356 U.S. at 100-101.

The methods of execution currently used in the United States include lethal injection, lethal gas, electrocution, hanging, and firing squad.[8/] California

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8. Within the jurisdiction of the Ninth Circuit, the methods of execution are: Arizona, lethal injection, unless inmate sentenced before 11/23/92 chooses lethal gas (Ariz. Rev. Stat. Ann. §13-704); California, choice of lethal injection or lethal gas (Cal. Penal Code § 3604); Idaho, lethal injection, unless impractical, then firing squad (Idaho Code §§ 19-2716); Montana, lethal injection (Mont. Code Ann. § 46-19-103(3)); Nevada, lethal injection (Nev. Rev. Stat. § 176.335); Oregon, lethal injection (Or. Rev. Stat. § 137.473); and Washington, choice of (continued...)

is among 37 of the 38 states with the death penalty that use lethal injection as a method of execution.[9] *See, e.g., Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994) (en banc), *cert. denied*, 511 U.S. 118 (2001) (discussing growing use of lethal injection while upholding constitutionality of Washington's use of hanging). The number of states authorizing lethal injection as a method of execution has increased from 22 states in 1992 to 37 states in 2002.

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8. (...continued)
lethal injection or hanging (Wash. Rev. Code § 10.95.180).

9. The states that currently authorize lethal injection for execution are: Alabama, Ala. Code 1975 § 15-18-82; Arizona, Ariz. Rev. Stat. Ann. § 13-704; Arkansas, Ark. Code Ann. § 5-4-617; California, Cal. Penal Code § 3604; Colorado, Colo. Rev. Stat. Ann. § 16-11-401; Connecticut, Conn. Gen. Stat. § 54-100; Delaware, Del. Code Ann. tit. 11, § 4209(f); Florida, Fla. Stats. § 922.105; Georgia, Ga. Code Ann., § 17-10-38; Idaho, Idaho Code § 19-2716; Illinois, Ill. St. ch. 725, § 5/119-5 (a)(1); Indiana, Ind. Code Ann. § 35-38-6-1; Kansas, Kan. Stat. Ann. § 22-4001; Kentucky, Ky. Rev. Stat. § 431.220; Louisiana, La. Rev. Stat. Ann. § 15:569 B; Maryland, Md. Code Ann., Corr. § 3-905; Mississippi, Miss. Code Ann. § 99-19-51 (1972); Missouri, Mo. Rev. Stat. § 546.720; Montana, Mont. Code Ann. § 46-19-103; Nevada, Nev. Rev. Stat. § 176.355 1; New Hampshire, N.H. Rev. Stat. Ann. § 630:5 XIII.; New Jersey, N.J. Stat. Ann. § 2C:49-2; New Mexico, N.M. Stat. Ann. § 31-14-11; New York, N.Y. Correct. Law § 658; North Carolina, N.C. Gen. Stat. § 15-187; Ohio, Ohio Rev. Code Ann. § 2949.22(B)(1); Oklahoma, Okla. Stat. Ann. tit. 22 § 1014; Oregon, Or. Rev. Stat. Ann. § 137.473; Pennsylvania, Pa. Stat. Ann. tit. 61 § 3004; South Carolina, S.C. Code § 24-3-530; South Dakota, S.D. Codified Laws § 23A-27A- 32; Tennessee, Tenn. Code Ann. § 40-23-114; Texas, Texas Code Crim. P. Ann. § 43.14; Utah, Utah Code Ann. § 77-18-5.5; Virginia, Va. Code § 53-1-233; Washington, Wash. Rev. Code Ann. § 10.95.180; and Wyoming, Wyo. Stat. Ann. § 7-13-904. In addition, the United States government and the United States military also currently authorize lethal injection for executions. *See* 28 C.F.R. § 26.3(4); Army Reg. 190-55.

In 1992, two-thirds of the executions in the United States were by means of lethal injection. In 2002, 99% of executions were by lethal injection.[10/] Since the death penalty was reinstated in 1977, 80% of all executions in the United States have been by means of lethal injection (654 of 820: Bureau of Justice Statistics Bulletin, Capital Punishment 2002, Nov. 2003, NCJ201848). Moreover, state and federal courts have consistently rejected challenges to lethal injection.[11/] These legislative and judicial determinations are evidence of society's

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10. Between January 1, 2003 and November 7, 2003, there were 60 executions by civil authorities in the United States and 59 were by lethal injection and one by electrocution (Virginia). The states performing lethal injections during this period: Texas (21); Oklahoma (14); North Carolina (5); Alabama (3); Florida (3); Georgia (3); Ohio (3); Indiana (2); Missouri (2); Virginia (2); Arkansas (1); Federal Government (1). Bureau of Justice Statistics Bulletin, Capital Punishment 2002, Nov. 2003, NCJ201848.

11. **Arizona**: *State v. Hinchey*, 890 P.2d 602, 610 (1995), *cert. denied*, 516 U.S. 993 (1995); **California**: *People v. Snow*, 30 Cal. 4th 43, 127 (2003); *People v. Welch*, 20 Cal. 4th 701, 770-773 (1999); *People v. Fairbank*, 16 Cal. 4th 1223, 1255-1256 (1997); *People v. Holt*, 15 Cal. 4th 619, 702-703 (1997); *People v. Bradford*, 14 Cal. 4th 1005, 1058-1059 (1997); **Connecticut**: *State v. Webb*, 680 A.2d 147 (Conn. 1996); *State v. Webb*, 252 Conn. 128, 138, 750 A.2d 448 (Conn. 2000), *cert. denied*, 531 U.S. 835 (2000); **Delaware**: *Dawson v. State,* 673 A.2d 1186 (Del. 1996), *cert. denied*, 519 U.S. 844 (1996); **Florida**: *Sims v. State*, 754 So.2d 657 (Fla. 2000), *cert. denied*, 528 U.S. 1183 (2000); **Idaho**: *Sivak v. State*, 731 P.2d 192 (Idaho 1986); **Illinois**: *People v. Stewart*, 520 N.E.2d 348 (Ill. 1988), *cert. denied*, 488 U.S. 900 (1988); **Indiana**: *Harrison v. State,* 644 N.E.2d 1243 (Ind. 1995); **Mississippi**: *Russell v. State*, 849 So.2d 95, 144-145 (Miss. 2003); *Carr v. State*, 655 So.2d 824 (Miss. 1995), *cert. denied*, 516 U.S. 1076 (1995); **Montana**: *State v. Gollehon*, 864 P.2d 249 (Mont. 1993), *cert. denied*, 513 U.S. 827 (1995); **Oklahoma**: *Romano v. State*, 917 P.2d 12 (Ok. 1996); (continued...)

attitude toward lethal injection. *State v. Webb*, 252 Conn. at 145-46, 750 A.2d at 457.

> There is general agreement that lethal injection is at present the most humane type of execution available and is far preferable to the sometimes barbaric means employed in the past. Many states have now abandoned other forms of execution in favor of lethal injection.

Hill v.Lockhart, 791 F. Supp. 1388 (E.D.Ala. 1992).

Medical experts have urged that death by lethal injection is the most humane of any method of execution. *See People v. Stewart*, 121 Ill.2d 93, 117 Ill. Dec. 187, 197, 520 N.E.2d 348, 358, *cert. denied*, 488 U.S. 900 (1988).

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11. (...continued)
Oregon: *State v. Moen*, 309 Or. 45, 786 P.2d 111, 143 (Or. 1990); **South Dakota**: *State v. Moeller*, 548 N.W.2d 465, 487-89 (S.D. 1996); **Texas**: *Ex parte Granviel*, 561 S.W. 503, 514 (1978) (use of sodium thiopental); **Tennessee**: *State v. Hines*, 919 S.W.2d 573, 582 (Tenn. 1995), *cert. denied*, 519 U.S. 847 (1995); **Virginia**: *Spencer v. Commonwealth*, 238 Va. 563, 568-69, 385 S.E.2d 850 (Va. 1989), *cert. denied*, 493 U.S. 1093 (1989); **Wyoming**: *Hopkinson v. State*, 798 P.2d 1186, 1187 (Wyo. 1990); **District Court (Arizona)**: *Lambright v. Lewis*, 932 F.Supp. 1547 (D. Ariz. 1996), *aff'd in part and remanded en banc sub nom. Lambright v. Stewart*, 191 F.3d 1181 (9th Cir. 1999); *LaGrand v. Lewis,* 883 F.Supp. 469, 470-71 (D.Ariz. 1995), *affirmed*, 133 F.3d 1253 (9th Cir. 1998), *cert. denied*, 525 U.S. 1050; **District Court (Arkansas)**: *Hill v. Lockhart*, 791 F.Supp. 1388, 1394 (E.D. Ark. 1992); **Fifth Circuit**: *Kelly v. Lynaugh*, 862 F.2d 1126, 1135 (5th Cir. 1988), *cert. denied*, 492 U.S. 925; **Ninth Circuit**: *Poland v. Stewart*, 117 F.3d 1094, 1104-05 (9th Cir. 1997), *cert. denied*, 523 U.S. 1082; *Rupe v. Wood*, 93 F.3d 1434 (9th Cir. 1996), *cert. denied*, 519 U.S. 1142 (1996); **Tenth Circuit**: *Andrews v. Shulsen*, 802 F.2d 1256 (10th Cir. 1986), *cert. denied*, 485 U.S. 919 (1986); **Federal prisoners**: *U.S. v. Chandler*, 950 F.Supp. 1545 (N.D. Ala. 1996), *affm.* 218 F.3d 1305, *cert. denied*, 531 U.S. 1204 (1997).

1. California's Lethal-injection Protocol Does Not Create a Risk of Masking a Painful Death

Cooper has alleged that California's use of lethal injection creates a "reasonable likelihood" of an "excruciatingly painful and protracted death" because he may reawaken because of inadequate sedation and experience excruciating pain during the execution process. (E.R. at 17.) To the contrary, there is no reasonable likelihood of Cooper experiencing an "excruciatingly painful and prolonged death."

California's lethal-injection protocol provides that five grams of sodium pentothal is the first chemical administered in the lethal-injection process. Connecticut's lethal-injection protocol involves administering half the amount of anesthesia used by California, *i.e.*, it administers 2,500 milligrams of thiopental sodium.[12/] (Ex. B [Decl. Warden Woodford].) The Connecticut Supreme Court observed that the dosage of thiopental sodium in the Connecticut protocol is:

> approximately nine times the typical dosage for surgery for an individual weighing 150 pounds, and would take effect within fifteen to twenty seconds and then dissipate after five to seven minutes. Because the effect of thiopental sodium varies from person to person, there is no known lethal dosage. The second agent, pancuronium bromide, causes skeletal muscle relaxation, in essence, paralysis. The protocol prescribes 100 milligrams of pancuronium bromide. This dosage of pancuronium bromide is

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12. Sodium pentothal, which is used in California's executions by lethal injection is the same substance as thiopental sodium. (*See* Ex. C, at 1, ¶ 4.)

> approximately ten times the normal dosage and would take effect within two minutes. The third agent, potassium chloride, is intended to cause a decrease in blood pressure, shock, cardiac arrhythmia and complete heart blockage. The protocol prescribes 120 milliequivalent of potassium chloride, a lethal dose, which would stop the heart instantly. Both anesthesiologists concluded that, if properly administered, the combination of agents together with the prescribed dosage would result in a quick, painless death.

State v. Webb, 252 Conn. at 134-35, 750 A.2d at 451-52.

The Florida Supreme Court similarly observed:

> On the issue of dosage, a defense expert admitted that only one milligram per kilogram of body weight is necessary to induce unconsciousness, and that a barbiturate coma is induced at five milligrams per kilogram of body weight. Thus, two grams of sodium pentothal (i.e., 2000 milligrams) is a lethal dose and certain to cause rapid loss of consciousness (i.e., within 30 seconds of injection). The expert further stated that muscle paralysis occurs at .1 milligram of pancuronium bromide per kilogram of body weight. Thus, fifty milligrams of pancuronium bromide far exceeds the amount necessary to achieve complete muscle paralysis. Finally, the expert admitted that 150 to 250 milliequivalents of potassium chloride would cause the heart to stop if injected quickly into the inmate and that an IV push would qualify as "quickly."

Sims v. State, 754 So.2d at 666 n.17.

In a challenge to Florida's lethal-injection procedure, a defense expert, Dr. Lipman, admitted that lethal injection is a simple procedure. He also admitted that given the high dosages of the lethal substances in Florida's protocol, death "would certainly result quickly and without sensation." *Sims v. State*, 754 So.2d

at 668 n.19. Accordingly, the use of less than half of the dose of sodium pentothal used by California results in a quick death without sensation.

Dr. Mark Dershwitz, M.D., Ph.D., is licensed to practice medicine in Massachusetts and Maine. He is a Professor of Anesthesiology and Biochemistry and Molecular Pharmacology at the University of Massachusetts. Dr. Dershwitz has concluded, to a reasonable degree of medical certainty, that once all of the anesthesia solution administered in the California execution protocol had been injected, over 99.99999% of the population would be unconscious. Furthermore, the larger dose of fast acting anesthesia administered by California "will cause virtually all persons to stop breathing within a minute of drug administration." Accordingly, "virtually every person given 5 grams of pentothal sodium will have stopped breathing prior to the administration of pancuronium bromide. Thus, even in the absence of the administration of pancuronium bromide and potassium chloride, the administration of five grams of thiopental sodium by itself would be lethal in almost everyone." (Ex. C [Decl. Dr. Dershwitz] at 3-4, ¶ 8.) Moreover, there is "approximately a 0.00006% probability that a condemned inmate given [5 grams of thiopental sodium] would be conscious, and able to experience pain, after a period of five minutes." (Ex. C [Decl. Dr. Dershwitz] at 3.)[13/]

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13. Dr. Dershwitz provided an expert declaration for the State of Ohio in (continued...)

2. Cooper's Complaints Regarding California's Protocol Are Indistinguishable From Challenges to Other States' Protocols That Have Been Consistently Rejected by State and Federal Courts

The complaints Cooper voices regarding California's protocol mirror the challenges that have been being raised and properly rejected by state and federal courts. Cooper complains that California's protocol creates an unnecessary risk of physical and psychological pain based on the absence of details regarding the handling of drugs, heart monitoring, and procedures and qualifications for personnel.[14] (E.R. at 17-19.) To the contrary, "written procedures are not constitutionally infirm simply because they fail to specify in explicit detail the execution protocol." *LaGrand*, 883 F. Supp. at 470; *see also Sims*, 754 So.2d at 668, n.20.

Cooper's complaints about California's execution protocol are markedly similar to the claims raised regarding Connecticut's lethal-injection protocol. *See State v. Webb*, 252 Conn. at 137, 750 A.2d at 453. The Connecticut Supreme

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13. (...continued)
an inmate's unsuccessful § 1983 action challenging Ohio's lethal-injection procedures. *In re Lewis Williams*, 6th Cir. No. 04-3014; *see* Ex. D (Decl. Dr. Rosow) at 1-2.

14. "Historically, physicians have participated in lethal gas and lethal injection executions in California." *Thorburn v. Department of Corrections*, 66 Cal. App. 4th 1284, 1286 (1998).

Court rejected the defendant's claim because the record failed to establish that the there was any reason to infer that the protocol would not be administered properly. Focusing on the objective evidence of the pain inherent in execution by lethal injection, the trial court properly determined that lethal injection does not constitute cruel and unusual punishment. As the Connecticut Supreme Court aptly concluded, there was simply no reason to believe that the defendant would experience anything more than the insertion of the intravenous catheter followed by unconsciousness.[15] *State v. Webb*, 252 Conn. at 141-142, 750 A.2d at 455.

Cooper speculates that California's use of thiopental will be inadequate because the protocol does not account for body weight, drug history, medical condition and history of the individual inmate. (E.R. at 19, 85.) His claim is unfounded. *Ex parte Granviel*, 561 S.W.2d at 510. As Dr. Dershwitz notes, the dosage of thiopental being used by California is several times that commonly used in surgery, and sufficient to induce unconsciousness for a period well in excess of the time necessary to complete an execution regardless of weight, history or medical condition. (Ex. C, at 5, ¶ 17.)

Cooper argues that the protocol's failure to address qualifications and procedures for personnel administering the chemicals creates an unacceptable risk

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15. Connecticut administers half the amount of thiopental as California. *State v. Webb*, 252 Conn. at 134, 750 A.2d at 451.

of a extremely painful death. (E.R. at 17.) Cooper's complaint about a lack of detail relating to the qualifications of personnel is not a basis for relief. *See Heckler*, 470 U.S. at 692-698; *Hill v. Lockhart*, 791 F. Supp. at 1394. As the Connecticut Supreme Court observed:

> . . . the circumstances surrounding an execution, namely the extreme dosage and ultimate objective, are unique to the execution process. . . . more skill in administering the drug is required in the medical setting because of the delicate balance between unconsciousness and death. The circumstances surrounding an execution do not require such a balance.

State v. Webb, 252 Conn. at 143, 750 A.2d at 456.

Speculation about what could go wrong exposes no inadequacy of California's procedure. *Sims*, 754 So.2d at 668, n.20; *State v. Hinchey*, 890 P.2d at 602. This is particularly true since Cooper's ruminations are based upon erroneous science. For example, Cooper contends that the "continuous administration" of anesthetic is required. As Dr. Dershwitz notes, this is based on a scientifically erroneous statement by Dr. Heath. Continuous infusion would not significantly decrease the already exceedingly small risk that a condemned inmate would regain consciousness, and any difference between California's administration of sodium pentothal and a continuous infusion is physiologically inconsequential. (Ex. C, at 3, ¶ 18.)

Cooper contends that the use of pancuronium bromide is inhumane, unnecessary, and only serves to mask excruciating pain.[16] (E.R. at 18.) As Dr. Dershwitz explains, the use of pancuronium bromide stops an inmate's breathing and acts to prevent manifestations of seizure activity. Since seizures occur commonly after a person's heart stops beating, the absence of pancuronium bromide will result in seizures that may be interpreted by lay observers as an indication of pain or discomfort. Dr. Dershwitz opines, "to a reasonable medical certainty, that California's use of sodium pentothal before, and in combination with, pancuronium bromide and potassium chloride results in an inmate's rapid and painless death." (Ex. C, at 6, ¶ 19; Ex. D at 2.)

California's protocol, of course, does not completely foreclose all possibility of human error. But as the Connecticut Supreme Court aptly observed, "the possibility of human error . . . always accompanies human endeavor." *State v. Webb*, 252 Conn. at 144, 750 A.2d at 456. And, as this Court has observed: "The risk of accident cannot and need not be eliminated from the execution

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16. Cooper cites to laws relating to cruelty to animals and restrictions on the use of Pavulon (pancuronium bromide) for purposes of euthanasia of animals. Nothing in the laws regarding animals or veterinary practices has any application to the State's execution of a condemned inmate. Moreover, the dosages and sequences of drugs used for lethal injection does not permit the comparisons Cooper seeks to draw between veterinary practices and lethal-injection practices. Accordingly, Cooper's reliance on veterinary practices and laws relating to animals is misplaced.

process in order to survive constitutional review." *Campbell v. Wood*, 18 F.3d at 667. Cooper's suggestion that California is constitutionally compelled to promulgate contingency "safeguards" that address all nature of unexpected events is nothing but a veiled attempt to "plac[e] totally unrealistic conditions on [the state's] use" of capital punishment. *Gregg v. Georgia*, 428 U.S. at 199. Nothing in the Constitution, of course, supports such folly.

Cooper cites to eyewitness accounts of executions in California, and claims of "botched" executions. (E.R. at 20, 73; AOB 19.) Similar speculative arguments have properly been rejected. *LaGrand v. Stewart*, 133 F.3d at 1265; *Poland v. Stewart*, 117 F.3d at 1105.

As Appellees noted below, Cooper's claims that inmates executed in California have suffered inhuman and excruciating deaths is not supported by qualified medical opinion. California's protocol results in an inmate's rapid and painless death. (Ex. C, at 3, ¶ 19; *compare* AOB 19 [asserting that Cooper presented "uncontested evidence" of botched executions in California].) Cooper alleged that "it is likely that California will use a 'cut-down' surgical procedure to open up Mr. Cooper in the event it cannot find a vein sufficient to administer these chemicals." (E.R. at 87; AOB 19.) Cooper faces no prospect of "cut-down" – and he knows it. (Ex. B.) Cooper's medical condition and veins have been

checked, and unlike the inmate in *Nelson*, there is nothing to indicate the use of anything other than an IV in carrying out his execution by lethal injection. (Ex. B; *see State v. Deputy*, 644 A.2d at 420, n.6.) Cooper's speculative complaint about California's execution protocol is facially insufficient to demonstrate a substantial risk of wanton and unnecessary infliction of pain. Among all of the constitutional methods known, procedures used in California are the most humane and bear the lowest risk of any pain.

3. Cooper Has Not Been Denied Due Process Based on San Quentin's Lethal-injection Protocol

Cooper contends that California's lethal-injection protocol violates his Due Process rights. (E.R. at 21-22.) As the United States Supreme Court has held:

> [I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

United States v. Lanier, 520 U.S. 259, 272 n.7, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

Even if Cooper's complaint were analyzed under Fourteenth Amendment principles, his claim would yield no different result. While the Due Process Clause protects citizens against arbitrary government action, "only the most

egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). As the High Court has made clear: "[I]n a due process challenge to executive action, the threshold question is whether the behavior of the governmental officers is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 847.

In developing California's lethal-injection protocol, the Warden of San Quentin consulted other wardens and visited Texas and observed their procedures being carried out by witnessing an execution. (E.R. at 266.) Only nine states have more experience in using lethal injection as a method of execution than California.[17/] Texas has the most experience, and there is nothing "arbitrary" about the Warden of San Quentin consulting other wardens, and visiting Texas

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17. Since 1977, the 654 executions in the United States by means of lethal injection have been conducted by 30 states and the federal government. The number of executions by lethal injection are as follows: Texas (289); Virginia (61); Missouri (59); Oklahoma (55); South Carolina (23); North Carolina (21); Arizona (20); Delaware (12); Illinois (12); California (8); Georgia (8); Nevada (8); Louisiana (7); Indiana (6); Ohio (5); Utah (4); Maryland (3); Pennsylvania (3); Mississippi (2); Montana (2); Oregon (2); Washington (2); Alabama (1); Colorado (1); Idaho (1); Kentucky (1); New Mexico (1); Tennessee (1); and Wyoming (1). Bureau of Justice Statistics Bulletin, Capital Punishment, 2002, Nov. 2003.

to observe their lethal-injection protocol firsthand, in developing California's protocol.[18/]

It is clear that Cooper's lethal-injection challenge is not only an attempt to manipulate a last-minute stay, it is also completely without merit. As every state and federal court to consider the matter has concluded, execution by lethal injection is not contrary to the Eighth Amendment. Contrary to Cooper's assertions in this Court, the District Court did not "assum[e]" that lethal injection is not constitutionally flawed (AOB 37); rather, it concluded – quite properly – that Cooper had failed in his burden of showing "as an irreducible minimum" that there is even "a fair chance of success on the merits" (E.R. at 13 n.4 [citing *Johnson v. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995)].) The District Court plainly acted within its discretion in denying Cooper's motion for a temporary restraining order.

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18. Even though due process does not require public notice, hearing and procedure for review regarding the Warden's choice of protocol, it is evident the Warden's choice was an informed one and thus complied with a basic principle of administrative law by first ascertaining facts to support the choices made. *Ex parte Granviel*, 561 S.W.2d at 515.

CONCLUSION

Accordingly, Appellees respectfully request that Cooper's motion for stay be denied.

Dated: February 8, 2004.

Respectfully submitted,

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04-99001

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN COOPER, *Plaintiff & Appellant,* **v.** **RICHARD A RIMMER,** ***Acting Director of the California Department of Corrections*****; JEANNE WOODFORD,** ***Warden, San Quentin State Prison, California,*** *Defendants & Appellees.*	**CAPITAL CASE** **EXECUTION DATE OF FEBRUARY 10, 2004**

STATEMENT OF RELATED CASES

Cases related: *Cooper v. Calderon*, 255 F.3d 1104 (9th Cir. 2001); *Cooper v. Calderon,* 274 F.3d 1270 (9th Cir. 2001); *Cooper v. Calderon*, No. 99-71430 (2/14/03); *Cooper v. Woodford*, No. 04-70578 (filed 2/6/04) (pending).

Dated: February 8, 2004.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 04-99001

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DECLARATION OF SERVICE BY COURIER, E-MAIL, & U.S. MAIL

I declare that I am employed in the County of San Diego, California; that I am over 18 years of age and am not a party to the within-entitled cause; that my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, California 92186-5266, and that on **February 8, 2004**, I served the attached

OPPOSITION TO EMERGENCY MOTION FOR STAY OF EXECUTION FOLLOWING DENIAL OF TEMPORARY RESTRAINING ORDER BY THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA *and* **EXHIBITS** ***in support thereof***	***Cooper v. Woodford*** U.S. Court of Appeals for the Ninth Circuit Case No. 04-99001 **CAPITAL CASE**

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Diego, California, on **February 8, 2004**.

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